CONFIDENTIAL COMMUNICATION BETWEEN PARENT AND CHILD: A CONSTITUTIONAL RIGHT

Prior to 1978 no jurisdiction, either by statute or common law decision, protected by a testimonial privilege the confidential communications shared between parents and their children. People v. Doe *is the seminal case which recognized a constitutionally based privilege arising out of the developing federal right to privacy. This Comment explores the political theory, the psychological data, and the case law which mandates the protection of confidences born of this most intimate relationship.*

Shall it be said . . . , "[l]isten to your son at the risk of being compelled to testify about his confidences?"[1]

Parents and children probably never stop to consider whether statements made between them in private are subject to a legally sanctioned testimonial privilege. In fact, no state currently protects such confidential communications between parent and child either by statute or by common law. Yet many parents, even if pressed, would refuse to testify as to what their child confided to them. There may be circumstances when an individual must answer to a personal sense of morality even in the face of the law's mandate to testify.[2]

Recently, an intermediate New York appellate court observed that even absent legislative or common law protection a parent might refuse to testify as to a child's confidences.[3] The court based this conclusion upon a federal constitutional right to privacy.[4] This Comment will briefly discuss the New York court's

1. People v. Doe, 61 App. Div. 2d 426, 429, 403 N.Y.S.2d 375, 378 (1978).

2. United States v. Worcester, 190 F. Supp. 548, 567 (D. Mass. 1960); H. THOREAU, WALDEN AND CIVIL DISOBEDIENCE (Norton Critical ed. 1966).

3. People v. Doe, 61 App. Div. 2d at 429, 403 N.Y.S.2d at 378.

4. *Id.* at 430-33, 403 N.Y.S.2d at 378-80. The *Doe* court's finding that a federal right to privacy protects the child's confidential communications is consistent with the broader developments in the law which recognize the constitutional rights of children. The Supreme Court has emphasized that the safeguards of the Bill of Rights and the fourteenth amendment are not "for adults alone." *In re* Gault, 387 U.S. 1, 13 (1967). *See* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1975); L.

opinion, then systematically evolve a constitutionally based parent-child testimonial privilege. The discussion will initially set forth an evidentiary approach to privileges and will then explore the political tradition of privacy and the family from a constitutional perspective. Additionally, the Comment discusses the psychological importance of confidentiality within the family context to emphasize that this privilege is of constitutional magnitude. Finally, a few of the limitations of a constitutionally protected confidential parent-child privilege will be suggested.

BACKGROUND: *PEOPLE V. DOE*

In 1978, the Appellate Division of the New York Supreme Court, in *People v. Doe*,[5] concluded that parents cannot be compelled to testify before a grand jury as to the confidential statements that their child previously made to them.[6] Mr. Justice Denman, speaking for the court, found that the confidential communications were not protected by statute or by the common-law evidentiary privileges.[7] Notwithstanding this lack of protection, the court held that the communications were within the protected zone of privacy created by the Federal Bill of Rights and made applicable to the states through the fourteenth amendment.[8] In reaching this determination, the *Doe* court considered the United States Supreme Court cases that recognize the critical role that the family plays within the constitutional scheme.[9] The court coupled with this the Supreme Court's acknowledgment that the family requires a favorable setting of privacy and autonomy. Once the constitutional value of family privacy was implicated, the *Doe*

TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-29 (1978). *See generally* Note, *Constitutional Rights of High School Students*, 23 DRAKE L. REV. 403 (1974). According to one commentator, the rights of children should be concomitant with the more encompassing human rights movement. Coughlin, *The Rights of Children*, in THE RIGHTS OF CHILDREN, EMERGENT CONCEPTS IN LAW AND SOCIETY 22 (A. Wilkerson ed. 1973). *See also* United Nations Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR, Supp. (No. 16) 19, U.N. Doc. A/4249 (1960).

5. 61 App. Div. 2d 426, 403 N.Y.S.2d 375 (1978).

6. *Id.* at 435 n.9, 403 N.Y.S.2d at 381 n.9. The court indicated in this note that it was not addressing a situation in which parents wished to testify and their child asserted a privilege. That situation would raise the broader question of who the holder of the privilege should be. Certainly, if the underlying premise of the privilege focuses on the vulnerability of the child, then the child must hold the privilege. Parents can assert the privilege on the child's behalf unless he knowingly and voluntarily waives the privilege. Whether the parents hold the parent-child privilege in their own right is beyond the scope of this Comment. If they do, the justification must be some theory other than the critical role that confidentiality plays in the child's development.

7. *Id.* at 428-29, 403 N.Y.S.2d at 377-78.

8. *Id.* at 430-33, 403 N.Y.S.2d at 378-79.

9. *Id.* at 429-33, 403 N.Y.S.2d at 378-80.

court balanced the state's interest in fact-finding against both the state's interest and the individual's interest in securing the family as a viable institution.[10]

The court's consideration of the intrusion into parent-child communications as contrary to social utility weighed heavily in its unanimous holding. This decision was premised on psychological evidence that indicated that the child's "emotional stability, character and self-image" find their origin in the family[11] and that the "atmosphere of trust and understanding without fear that his confidences" will be broken are essential to the development of stability in the child's personality.[12] In conclusion, the *Doe* court reasoned that the price of obtaining the testimony was too great.[13]

In addition to the social disutility considerations, the justices experienced an "instinctive revulsion" to requiring parental disclosure of their child's confidences.[14] This feeling seemed to be a substantial factor in the constitutional balance. The "instinctive revulsion" and the perceived threat to the family as an institution within the constitutional framework convinced the court that the "right to privacy" barred disclosure. The *Doe* court concluded that the United States Constitution protects this critical confidential relationship[15] despite the fact that no previously established evidentiary privilege applied.

THE BACKDROP OF EVIDENTIARY PRIVILEGES

A well-established proposition of the law of evidence entitles a court of justice to "every man's evidence."[16] Thus, the law places an affirmative duty on every citizen to give testimony when required. As Professor Wigmore pointed out, "the demand comes, not from any person or set of persons, but from the community as

10. *Id.* at 432-33, 403 N.Y.S.2d at 380.

11. *Id. See also* G. THOMAS, PARENT EFFECTIVENESS TRAINING (1975); Josselyn, *Adolescence*, in 1 AMERICAN HANDBOOK OF PSYCHIATRY 382 (S. Arieti ed. 1974); Lidz, *The Family: The Developmental Setting*, in AMERICAN HANDBOOK OF PSYCHIATRY 252 (S. Arieti ed. 1974).

12. *See* authorities cited note 11 *supra*. *See also* authorities cited notes 14-16 *infra*.

13. 61 App. Div. 2d at 433-34, 403 N.Y.S.2d at 380.

14. *Id.* at 434, 403 N.Y.S.2d at 381. *See* Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 617-18 (1969-70); Manley, *Patient, Penitent, Client, and Spouse in New York*, 21 N.Y. ST. B. A. BULL. 288, 290 (1949).

15. 61 App. Div. 2d at 434, 403 N.Y.S.2d at 380.

16. 8 J. WIGMORE, EVIDENCE § 2192, at 70 (McNaughton rev. ed. 1961).

a whole—from justice as an institution and from law and order as indispensable elements of civilized life."[17] Because the demand to testify is for the good of the entire society, no man can refuse the societal mandate in order to protect his own interest unless a recognized privilege not to testify applies.[18] Privileges are sparingly created and narrowly construed. The belief is that without full investigation and disclosure of all potential evidence, truth cannot be ascertained and justice served.[19]

The creation of any privilege should not be an arbitrary and irrational obstacle to the search for truth. Rather, a privilege should arise only when society makes the reasoned determination that the protection of some individual interest is of transcendent importance.[20] Only then can the interest in fact-finding be superseded. Certainly, the expedient elicitation of testimony is only one of the paramount values in a civilized society.[21] Society, by permitting certain testimonial privileges, admittedly hampers the quest for truth in particular instances, thus acknowledging that there are other values which must be placed in the balance. "Truth, like all other good things, may be loved unwisely—may be pursued too keenly—may cost too much."[22]

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17. *Id.* at 72-73.

18. Bentham, one of the leading opponents of testimonial privileges, illustrated this proposition by stating:

> [E]verybody is obliged to attend, and nobody complains of it. Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpennyworth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.

J. BENTHAM, *Draught for the Organization of Judicial Establishments*, in 4 THE WORKS OF JEREMY BENTHAM 320 (J. Bowring ed. 1843), *cited in* Branzburg v. Hayes, 408 U.S. 665, 688-89 n.26 (1972). *See* 8 J. WIGMORE, EVIDENCE § 2192, at 71 (McNaughton rev. ed. 1961). But compare this statement with Bentham's recognition that an invasion of the right to privacy requires necessary utility. Negley, *Philosophical Views on the Value of Privacy*, 31 L. & CONTEMP. PROB. 319, 321-22 (1966). *See also* Judge Learned Hand in McMann v. SEC, 87 F.2d 377, 378 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937); Blair v. United States, 250 U.S. 273, 281 (1919).

19. 8 J. WIGMORE, EVIDENCE § 2192, at 73 (McNaughton rev. ed. 1961).

20. Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911, 913 (1974). *See also* 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961).

21. Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911, 914 & n.16 (1974). Consider also the so-called privilege against self-incrimination guaranteed by the fifth amendment to the United States Constitution. *See* U.S. CONST. amend. V. *See generally In re* Gault, 387 U.S. 1, 47 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485 (1977).

22. Pearse v. Pearse, 1 De G. & Sm. 12, 28-29, 63 Eng. Rep. 950, 957 (1846); Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 605 (1969-70); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 101 (1956). *See also*

Most jurisdictions, by statute or common law decision, sanction limited testimonial privileges protecting certain relationships considered to be critical.[23] Recognition of the desirability of protecting these special relationships has been traced, in part, to Roman law. The Romans felt that it was naturally repugnant to disrupt the fidelity inherent in intimate relationships.[24] The creation of a testimonial privilege may also arise because of the disutility of compelling testimony.[25] No doubt one of the strongest and yet most difficult rationales to substantiate is based upon the belief that the parties might be deterred from engaging in an interaction[26] which society wants to foster. In most instances, some combination of both theories interplays to justify a common law or a statutory privilege.[27]

The common law right to privacy[28] encompasses these preceding justifications while affording broader protection. Jeremy Bentham acknowledged the existence of a right to privacy that protects the individual from unnecessary intrusions by the

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Olmstead v. United States, 277 U.S. 438, 479 n.12 (1927) (Brandeis, J., dissenting) *overruled on other grounds in* Katz v. United States, 389 U.S. 347 (1967); *id.* at 470 (Holmes, J., dissenting).

23. *See generally* 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 201 (1978); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 77 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE ch. 81 (McNaughton rev. ed. 1961); Note, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297, 298 (1973).

24. Fisher, *The Psychotherapeutic Professions and the Law of Privileged Communications*, 10 WAYNE L. REV. 609, 623-25 (1964); Radin, *The Privilege of Confidential Communications Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928). *See also* authorities cited note 14 *supra*.

25. *See generally* 8 J. WIGMORE, EVIDENCE § 2285, at 527 (McNaughton rev. ed. 1961).

26. According to one commentator:

> At present, there is one, and only one, justification—that the relationship is rendered ineffective either because a person is deterred from entering into it or because the person is frightened into non-disclosure during its course, and, that the effect of such an absence of the privilege is undesirable in light of the relationship to society.

Fisher, *supra* note 24, at 611.

27. *Id.* at 624. However, some theorists reject the utilitarian approach entirely. They prefer to adopt a "theory of rights" approach to privileged communications. "These non-utilitarians argue . . . that persons have moral rights by virtue of their humanity, and that these rights cannot be over-ridden simply to satisfy a general utilitarian calculus." Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 480 n.66 (1977). *See also* note 125 *infra*.

28. Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

state.[29] A similar recognition of this right may have led the United States Congress, in January 1975, to adopt broad common-law confidential privileges.[30] Congress enacted these privileges in place of proposed court rules[31] that would have greatly reduced the existing testimonial privileges. Congress, by creating broad testimonial privileges protecting confidential communications, was deferring to the societal mandate that a zone of privacy[32] be maintained.

Confidential communications between husband and wife fall within a protected zone sanctioned in most jurisdictions by a statutory privilege.[33] Various other relationships giving rise to confidential privileges include attorney-client,[34] priest-penitent,[35]

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29. Negley, *Philosophical Views on the Value of Privacy*, 31 L. & CONTEMP. PROB. 319, 321-22 (1966).

30. FED. R. EVID. 501. *See* 2 D. LOUISELL & C. MUELLER, *supra* note 23, at 389-882; 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 501[01], at 501-1 to 501-17 (1979).

31. 28 U.S.C.S. app. 6, at 429 (1975) (proposed rules promulgated by Supreme Court's advisory committee but rejected by Congress). Mr. Justice Douglas dissented from the promulgation of the rules, stating in part that "this Court does not write the rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit." *Id.* at 430 (Douglas, J., dissenting). *See* 2 D. LOUISELL & C. MUELLER, *supra* note 23, at 401-11; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61 (1973). Comment, *The Privilege Doctrine and the Proposed Federal Rules of Evidence*, 24 SYRACUSE L. REV. 1173 (1973).

32. One commentator wrote a letter to Congress prior to its rejection of the proposed rules suggesting that several of the rules might present constitutional difficulties. Professor Black suggested that at least with respect to certain confidential communications the rules might be violative of the right to privacy recognized by the Supreme Court. Black, *The Marital and Physician Privileges—A Reprint of a Letter to a Congressman*, 1975 DUKE L. J. 45, 48-51 (1975). *See also* 2 D. LOUISELL & C. MUELLER, *supra* note 23, at 418-19; Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 94-100 (1973).

33. 2 D. LOUISELL & C. MUELLER, *supra* note 23, § 219; 8 J. WIGMORE, EVIDENCE chs. 79 & 83 (McNaughton rev. ed. 1961); Note, *The Marital Testimony and Communications Privileges: Improvements and Uncertainties in California and Federal Courts*, 9 U.C.D. L. REV. 569 (1976). This Comment makes no attempt to differentiate between the various recognized marital privileges.

34. 2 D. LOUISELL & C. MUELLER, *supra* note 23, §§ 207-213; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 87-97 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE ch. 82 (McNaughton rev. ed. 1961). *See also* Note, *The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977).

35. Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958); 2 D. LOUISELL & C. MUELLER, *supra* note 23, at § 214; 8 J. WIGMORE, EVIDENCE ch. 87 (McNaughton rev. ed. 1961); Callahan, *Historical Inquiry Into the Priest-Penitent Privilege*, 36 JURIST 328 (1976). *See also* Stoyles, *The Dilemma of the Constitutionality of the Priest-Penitent Privilege—The Application of the Religion Clauses*, 29 U. PITT. L. REV. 27 (1967).

physician-patient,[36] and psychotherapist-patient.[37] Considering the intimate relationships that are protected by a confidential communication privilege, it is striking that no jurisdictions have protected the private conversations of parent and child.[38] Surely, the legislatures and courts could not have concluded that the only confidences within the family worthy of protection are those between spouses. Are a child's confidences less worthy of protection?

There is hardly a more fitting situation to apply Federal Circuit Judge Edgerton's formula[39] than the child-parent confidential interaction. A "communication made in reasonable confidence" must be protected by a privilege because failure to do so is "shocking to the moral sense of the community."[40] The law can-

36. 2 D. LOUISELL & C. MUELLER, *supra* note 23, § 215; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 98-105 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE ch. 86 (McNaughton rev. ed. 1961).

37. 2 D. LOUISELL & C. MUELLER, *supra* note 23, § 216. Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375 (1975); Note, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297 (1973). *See also* Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911 (1974) (argument for extension of therapeutic privilege to school guidance counselor relationship). Additionally, two courts have suggested that the psychotherapist-patient privilege has federal constitutional underpinning. *See* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977) (note especially Judge Hufstedler's dissent); *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970); Annot., 44 A.L.R.3d 24 (1972); Note, *Psychotherapy and* Griswold: *Is Confidence a Privilege or Right?*, 3 CONN. L. REV. 599 (1971); 49 TEX. L. REV. 929 (1971).

38. *See generally* Ames v. Ames, 231 Mich. 347, 204 N.W. 117 (1925) (lower court's refusal to permit son to testify in divorce proceeding held to be reversible error); *see also In re* Terry W., 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976), in which the court was confronted with the question of whether the Constitution establishes a child-parent confidential privilege. The *Terry* court denied the privilege absent more persuasive authority from the United States Supreme Court. *Id.* at 749, 130 Cal. Rptr. at 915.

39. Mullen v. United States, 263 F.2d 275 (D.C. Cir. 1958).

40. *Id.* at 281. *Accord*, 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961). Wigmore's four criteria for the creation of a confidential privilege seem to be satisfied by the child-parent relationship:

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. See Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 623-32 (1969-70) (applies Wigmore's formulation to the child-parent situation). *See* notes 9-12 and accompanying text *supra.*

not conclude that the absence of confidentiality will have no effect on the growth of the child and his development into a functioning individual within the social processes of a democracy.

PRIVACY AND DEMOCRACY

Underlying the rationale for the creation of confidential testimonial privileges is a fundamental understanding of the respective positions of the individual and the state. The concept of privacy[41] arises out of this balance. Privacy is considered the sine qua non to development of human dignity.[42] Without governmental respect for individual privacy, relationships based on love and friendship cannot flourish.[43]

The right to withhold information is an important component of individual privacy.[44] Privacy also entails the need to communicate as an essential aspect of the individual's nourishment and growth.[45] A society that does not afford this protected zone to the individual does not foster his growth.[46] This lack of growth, in turn, hinders the development of the family into a strong, independent institution within the societal structure.[47] Thus, the political system and its values will determine the degree to which the individual's privacy interest is respected by government.[48] Confidential relationships will not inspire the protection of testimonial privileges when the political scheme does not place strong emphasis on privacy and resulting individual autonomy.

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41. Privacy is a multifaceted concept, and no attempt is made to explore all its possible permutations. *See generally* Fried, *Privacy*, 77 YALE L.J. 475 (1968); Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233 (1977); Shils, *Privacy: Its Constitution and Vicissitudes*, 31 L. & CONTEMP. PROB. 281 (1966).

42. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1000 (1964). *See generally* Fried, *Privacy*, 77 YALE L.J. 475 (1968).

43. Fried, *Privacy*, 77 YALE L.J. 475, 484 (1968). *See generally* G. SIMMEL, THE SOCIOLOGY OF GEORG SIMMEL 307-44 (1950); Brim & Ruebhausen, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1188-90 (1965).

44. Jourard, *Some Psychological Aspects of Privacy*, 31 L. & CONTEMP. PROB. 307, 307 (1966) (the desire to remain an enigma). *See generally* E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959). Goffman's discussion focuses on the function of selective disclosure. An individual by limiting disclosure of vital information about himself can control another's perception.

45. A. WESTIN, PRIVACY AND FREEDOM 31-36 (1967); Brim & Ruebhausen, *Privacy and Behavioral Research*, 65 COLUM. L. REV. 1184, 1189 (1965).

46. The autonomy that privacy protects is also vital to the development of individuality and consciousness of individual choice in life. Leontine Young has noted that "without privacy there is no individuality. There are only types. Who can know what he thinks and feels if he never has the opportunity to be alone with his thoughts and feelings?"

A. WESTIN, PRIVACY AND FREEDOM 34 (1967) (quoting L. YOUNG, LIFE AMONG THE GIANTS (1966)).

47. Fried, *Privacy*, 77 YALE L.J. 475, 484 (1968). *See generally* authorities cited note 43 *supra*.

48. *See generally* A. WESTIN, PRIVACY AND FREEDOM ch. 2 (1967).

A totalitarian state is characterized by a high level of surveillance and disclosure.[49] Neither the individual nor his associations are free from the state's intense scrutiny. By contrast, the modern constitutional democracy draws its lifeblood from the independent and self-reliant individuals which it nurtures.[50] This is achieved through the media of privacy and the family.

> Liberal democratic theory assumes that a good life for the individual must have substantial areas of interest apart from political participation—time devoted to sports, arts, literature, and similar non-political pursuits. . . . [It] maintains a strong commitment to the family as a basic and autonomous unit responsible for important educational, religious, and moral roles, and therefore the family is allowed to assert claims to physical and legal privacy against both society and the state.[51]

This theoretical underpinning of the right to privacy is indicative of the values at stake when the government arguably encroaches upon the individual's confidential relationships. The search for a confidential child-parent privilege amidst the constitutionally protected right to privacy must always touch upon the nature of the democratic process. Whether this particular relationship warrants constitutional safeguards depends on both the significance of the child-parent relationship within the political structure and the burden placed upon that relationship by the failure to sanction a zone of privacy.

THE CONSTITUTIONALLY PROTECTED ZONE OF PRIVACY

At the outset it must be stressed that neither the United States Constitution nor the Bill of Rights makes explicit mention of a right to privacy. Yet the United States Supreme Court recognized long ago that the absence of an enumerated right is not necessarily a bar to constitutional protection.[52] A constitutional right may

49. *Id.* at 23. *Accord*, H. ARENDT, ORIGINS OF TOTALITARIANISM 389-419 (1958); R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM (1963). The totalitarian regime demands total loyalty and the breakdown of all confidences. *Id.* at 426; B. MUSSOLINI, FASCISM, DOCTRINE, AND INSTITUTIONS (1935); Hollander, *Privacy: A Bastion Stormed*, in 12 PROBLEMS OF COMMUNISM 1 (1963); Mead & Calas, *Child Training Ideas in a Post Revolutionary Context: Soviet Russia*, in CHILDHOOD IN CONTEMPORARY CULTURES 179, 190-91 (1955).

50. *See, e.g.*, H. ARENDT, THE HUMAN CONDITION 23-69 (1959); THE FEDERALIST No. 10 (J. Madison); *id.* No. 15 (A. Hamilton); A. WESTIN, PRIVACY AND FREEDOM 23 (1967); Rossiter, *Patterns of Liberty*, in ASPECTS OF LIBERTY 15 (1958); Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). *See generally* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (rev. ed 1966); D. FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION ch. 1 (1963).

51. A. WESTIN, PRIVACY AND FREEDOM 24 (1967).

52. Boyd v. United States, 116 U.S. 616, 635 (1886); *See also* Kauper, *Penum-*

be present by implication.[53] In *Boyd v. United States*, the Court asserted that a constitutional provision protecting individual rights must be liberally construed.[54]

One such liberal articulation of a general right to individual privacy can be found in Mr. Justice Brandeis' dissenting opinion in *Olmstead v. United States*.[55] Mr. Justice Brandeis posited that the framers of the constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the *right to be let alone* . . . ."[56] Appreciation of this value of privacy, as a component of civilized life, led the Supreme Court to shield the family[57] and its autonomy.

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bras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold *Case*, 64 MICH. L. REV. 235 (1965); McKay, *The Right to Privacy: Emanations and Intimations*, 64 MICH. L. REV. 259 (1965).

53. Boyd v. United States, 116 U.S. 616, 635 (1886).

54. *Id.* Applying the fourth and fifth amendments to the situation at hand, the *Boyd* Court stated:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed.

Id. at 635. *See also In re* Pacific Ry. Comm'n, 32 F. 241, 250 (1887).

55. 277 U.S. 438, 471 (1928).

56. *Id.* at 478 (Brandeis, J., dissenting) (emphasis added).

57. The issue of what constitutes the "family" is not altogether clear in the Supreme Court decisions. See the Court's recent discussion in Smith v. Organization of Foster Families, 431 U.S. 816 (1977). The Court held that, within the New York program of foster care, a foster parent did not have the same claim to constitutional safeguards as the natural parents. However, the majority acknowledged that

> the importance of the familial relationship, to the individuals involved and to the society, stems from the *emotional attachments* that derive from the *intimacy* of *daily association*, and from the role it plays in "promot[ing] a way of life" through the instruction of children, Wisconsin v. Yoder, 406 U.S. 205, 231-233 (1972), as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.

Id. at 844 (emphasis added) (footnotes omitted). *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 128-37 (1977); Comment, *The Legal Family—A Definitional Analysis*, 13 J. FAM. L. 781 (1973-74).

Additionally, in Smith v. Organization of Foster Families, 431 U.S. at 845, Mr. Justice Brennan suggested that were he required to choose between protecting the child's natural parents or the foster parent, he would shield the former because the ties are "intrinsic human rights." *Id.* *See* Note, *The Fundamental Right to Family Integrity and Its Role in New York Foster Care Adjudication*, 44 BROOKLYN L. REV. 63 (1977). The question then arises if a foster family would be entitled to the same substantive rights as the natural parents. The majority indicates that this does not necessarily follow. Smith v. Organization of Foster Families, 431 U.S. at 843 n.48. Yet the "parent" in Prince v. Massachusetts, 321 U.S. 158 (1944), was an aunt and not a natural parent. *See* Smith v. Organization of Foster Families,

As early as 1923, the Court, in *Meyer v. Nebraska*, held unconstitutional a statute that prohibited families from formally educating their children in modern foreign languages.[58] This statute was to apply until the student reached the ninth grade. Construing the language of the fourteenth amendment,[59] the Court concluded that its safeguard extends not only to bodily restraint but also ensures the right "to acquire useful knowledge, to marry, *establish a home* and *bring up children*."[60] This expansive interpretation of the fourteenth amendment was derived from the Court's understanding that the family unit is functionally at the heart of democracy.[61] Further, the decision is premised on the belief that the family must be permitted autonomy.[62] Absent this autonomy, the family cannot foster the child's development adequately to achieve the traditional goals of our highly individualized democratic society.

A subsequent articulation of this doctrine of family educational

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431 U.S. at 843 n.49; Moore v. City of E. Cleveland, 431 U.S. at 504-06 (plurality opinion).

58. Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

59. "[N]o state shall . . . deprive any person of life, *liberty* or property, without due process of law." U.S. CONST. amend. XIV (emphasis added).

60. Meyer v. Nebraska, 262 U.S. at 399 (emphasis added).

The right to marry and raise a family is considered to be one of the basic civil rights of all people. It is basic both for the pursuit of happiness and for the survival of the human race. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). The state cannot unreasonably and arbitrarily interfere with this right. Loving v. Virginia, 388 U.S. 1 (1967).

"While the outer limits of [the right to personal privacy] have not been marked by the Court, it is clear that . . . an individual may make without unjustified government interference . . . decisions relating to marriage, . . . family relationships, and . . . child rearing . . . ." Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977), *cited with approval in* Zablocki v. Redhail, 434 U.S. 374 (1978). *But see id.* at 392 (Stewart, J., concurring); *id.* at 407 (Rehnquist, J., dissenting).

Mr. Justice Rehnquist indicated that marriage may not be the kind of "fundamental right" that *invariably* triggers the strictest scrutiny. The level of scrutiny depends on whether the burden on marriage is "direct." Yet the burden in *Redhail* was an outright prohibition of marriage—what could be more direct? Justice Rehnquist seemed to have based his decision on Califano v. Jobst, 434 U.S. 47 (1977), which also involved economic motivations. The cases are distinguishable; because in *Jobst* marriage was only discouraged, there was no outright prohibition. Zablocki v. Redhail, 434 U.S. at 408 (Rehnquist, J., dissenting).

61. Contrast this interpretation with the attitude toward the family embraced by totalitarian society or Plato's "Ideal Republic." *See* PLATO, THE REPUBLIC (P. Shorey trans. 1970); notes 49-50 and accompanying text *supra*. The *Meyer* Court recognized the basic distinction in political philosophy. Meyer v. Nebraska, 262 U.S. at 401-02.

62. *See* Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

autonomy serves to illuminate further the spectrum of this zone of privacy.[63] The Court, in *Pierce v. Society of Sisters*, concluded that a state cannot compel children between the ages of eight and sixteen to attend public school.[64] Parents have a constitutional right to send their children to parochial school. The *Pierce* Court reasoned that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to *standardize* its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[65]

Meyer and *Pierce* form the foundation for any discussion that explores the limits of familial privacy and autonomy. It is not argued that the state may never regulate aspects of family life, for surely it can.[66] Rather, as recent cases have emphasized, the state must demonstrate a compelling[67] need to substantially burden a fundamental constitutional value.[68] Nor does this protected

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63. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

64. *Id.* at 534-35.

65. *Id.* at 535 (emphasis added).

66. Prince v. Massachusetts, 321 U.S. 158 (1944) (a legitimate exercise of state's police power might outweigh the familial interest).

67. The requirement of a compelling state interest is one component of the strict scrutiny model of equal protection. "[T]he idea of strict scrutiny acknowledges that other political choices—those burdening fundamental rights . . . must be subjected to close analysis in order to preserve substantive values . . . [and] liberty." *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1000 (1978). The Supreme Court has applied similar language in numerous cases. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645 (1972), where the court expressed this underlying rationale:

> [T]he Constitution recognizes higher values than *speed and efficiency*. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Id. at 656 (emphasis added). *See* Boddie v. Connecticut, 401 U.S. 371, 377 (1971) (due process requires a "countervailing" state interest of "overriding" significance).

68. Wisconsin v. Yoder, 406 U.S. 205 (1972). The *Yoder* Court held that the state did not show an interest in compulsory high school education of "sufficient magnitude" to overshadow the Amish family's interest under the "free exercise" clause of the first amendment. *Id.* at 214. The majority closely scrutinized the compulsory education scheme and found it unconstitutional in its application to the peculiarities of the Amish child's education. *Id.* at 221-29. *But cf.* Zablocki v. Redhail, 434 U.S. 374, 407 (1978) (Mr. Justice Rehnquist indicated in his dissent that burdening of the family need not always activate the most demanding scrutiny).

Assuming that a fundamental family interest is recognized, the government must then establish a compelling interest to warrant intrusion on the asserted right. Thus, if a child-parent confidential communication is acknowledged as a "fundamental right," then it follows that a substantial government interest must be shown in order to intrude upon it. Surely, speed and efficiency in the ascertain-

zone of family rights stop with the parents' freedom to make educational decisions. Mr. Justice Harlan, dissenting in *Poe v. Ullman*,[69] submitted that the intimate relations of the marital bedroom are shielded from all substantial and arbitrary intrusions or restraints by government.[70] The majority in *Griswold v. Connecticut* later adopted similar reasoning.[71] The *Griswold* Court's opinion, written by Mr. Justice Douglas, concluded that the Connecticut statutory scheme which prohibited contraceptives was unconstitutional because of the substantial burden it placed upon a protected zone of privacy.[72] Summing up, Justice Douglas stressed:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. . . . Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
>
> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[73]

More recent cases[74] have extended the holding of *Griswold* beyond the marital community decisions regarding birth control to other aspects of intimate family relations. State statutes regulat-

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ment of truth cannot dictate such an intrusion. Stanley v. Illinois, 405 U.S. 645, 656 (1972). For additional situations involving "fundamental rights," see Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). *See generally The Supreme Court, 1976 Term*, 91 HARV. L. REV. 72, 137-52 (1977).

69. 367 U.S. 497 (1961). The majority never reached the merits in *Poe*. *Id.* at 497.

70. *Id.* at 553-54 (Harlan, J., dissenting).

71. Griswold v. Connecticut, 381 U.S. 479 (1965) (criminal sanctions against the use of contraceptives by marriage partners is denial of due process). *See* Eisenstadt v. Baird, 405 U.S. 438, 452-53 (1972) (*Griswold* "privacy" rationale extended to single adults. The *Baird* Court strictly scrutinized asserted state interests and found them inadequate). *See generally* Note, *Group Privacy, The Right to Huddle*, 8 RUT.-CAM. L.J. 219, 228 (1977).

72. Griswold v. Connecticut, 381 U.S. at 485. The state failed to demonstrate a "subordinating interest which is compelling." *Id.* at 497 (Goldberg, J., concurring) (quoting Bates v. Little Rock, 361 U.S. 516, 524 (1960)).

73. Griswold v. Connecticut, 381 U.S. at 485-86.

74. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 15, at 886 (1978).

ing or prohibiting abortion[75] and regulating family living arrangements[76] have confronted the Court. These cases have necessitated the Supreme Court's further examination of the doctrines surrounding family privacy and autonomy.

In *Moore v. City of East Cleveland*, the City sought to regulate the type of family members permitted to occupy a "single family dwelling."[77] Writing for the majority, Mr. Justice Powell remarked: "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[78] Earlier decisions of the Court acknowledging the sanctity of the family unit as the bulwark of democracy comprised the foundation of Justice Powell's reasoning.[79]

The language of *Moore*, when considered in conjunction with the discussion of privacy found in *Whalen v. Roe*,[80] goes far to elucidate the Court's present view of familial privacy. Professor Tribe, in his treatise *American Constitutional Law*, summed up the significance of the *Whalen* decision: The rights described in *Whalen* comprise more than the "least common denominator" of the Supreme Court's prior holdings with "respect to marital

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75. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (state must demonstrate compelling interest and necessity to burden a woman's "fundamental right" to an abortion). *See* note 68 *supra*.

76. *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

77. *Id.* at 494-97. The state's statute recognized few categories of related individuals as "family" for the purpose of living together. *See also* note 57 *supra* (discussion of the family).

78. Moore v. City of E. Cleveland, 431 U.S. at 499.

79. The "Constitution protects the sanctity of the family precisely because the institution . . . is *deeply rooted* in this Nation's history and tradition. It is through the family that we *inculcate* . . . many of our *most cherished values* . . . ." *Id.* at 503-04 (emphasis added). *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

Compare Griswold v. Connecticut, 381 U.S. at 495-96 (Goldberg, J., concurring), *and id.* at 502-03 (White, J., concurring), *with* Moore v. City of E. Cleveland, 431 U.S. at 549 (White, J., dissenting). Mr. Justice White believes that the due process clause extends "substantial protection to various phases of family life." Moore v. City of E. Cleveland, 431 U.S. at 549. The right to live in a home with more than one grandchild is not within the scope of this protection. *See* Zablocki v. Redhail, 434 U.S. 374, 407 (1978) (Rehnquist, J., dissenting). *See* note 60 *supra*.

Further, confidentiality is more fundamental to the family relationship than is the choice of which members of the extended family with whom to live. Family confidentiality is bound up in the maintenance of various aspects of the family itself. Griswold v. Connecticut, 381 U.S. 479 (1965) (recognition of spousal confidentiality). *See also* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970) (recognition of psychotherapist-patient confidentiality).

80. 429 U.S. 589 (1977).

choice, procreation, contraception, and child rearing."[81] In *Whalen*, Mr. Justice Stevens, writing for a unanimous Court, indicated that the Supreme Court's doctrine of the right to privacy encompasses two distinct rights.[82] The first right secures the somewhat general "individual interest in avoiding disclosure of personal matters."[83] The second right protects the interest of the individual or of the family "in independence in making certain kinds of important decisions."[84]

Whalen is critical to a discussion of confidential privileges. The issue addressed by the Court in *Whalen* focused on the extent to which a patient[85] has a right to withhold information that he does not wish to share with others.[86] The Court upheld the New York drug control scheme[87] requiring limited disclosure of specified regulated drugs. In so holding, the Court closely examined the asserted legislative purpose[88] and the elaborate safeguards[89] to the individual's privacy which were built into the statute. Given the circumscribed disclosure and the numerous safeguards, the Court did not require the state to prove that patient information is absolutely necessary.[90] Normally, when a fundamental interest is at stake the state must make a greater showing of necessity.[91]

The scope of disclosure required in *Whalen* should be contrasted with the ubiquitous disclosure of a public trial proceeding. The threat to privacy is greatly magnified when the facts are

81. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1, at 886 (1978).

82. Whalen v. Roe, 429 U.S. 589, 598-600 (1977). *Contra*, Crain v. Krehbiel, 443 F. Supp. 202, 207 (N.D. Cal. 1977). District Judge Renfrew has suggested a third aspect of privacy. *See generally* Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CALIF. L. REV. 1447 (1976).

83. Whalen v. Roe, 429 U.S. at 599. *See id.* n.25.

84. *Id.* at 600. However, Mr. Justice Stewart does not recognize a "general" right to privacy. *Id.* at 607-09 (concurring opinion).

85. In comparison, the issue addressed in this Comment concerns the parents' or child's right to withhold information from the general public.

86. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-1, at 888 (1978).

87. *See* Whalen v. Roe, 429 U.S. at 591 nn.6-13.

88. *Id.* at 592-93.

89. The information was to be kept in a secured data bank. Seventeen Department of Health employees and 24 investigators had access to the information. Additionally, the statute provided for a fine of up to $2,000 and one year's imprisonment. *Id.* at 593-95.

90. *Id.* at 598. Mr. Justice Brennan, concurring, indicated that had the statute permitted broad dissemination of the information, only a compelling interest could overcome the patient's right to privacy. *Id.* at 606. *But see id.* at 607-09 (Stewart, J., concurring).

91. *See* notes 67-68 and accompanying text *supra*.

bared to the entire world. Additionally, if the person disclosing the information is a member of the parent-child community, the constitutionally protected realm of family life is also involved. This added factor would weigh heavily in the balance against the state interest.[92] When government attempts to compel disclosure of confidential information in open court in a manner threatening[93] to the psychological effectiveness of the child-parent relationship, the strictest judicial scrutiny should apply. The state must sustain a much greater showing of necessity than the *Whalen* Court required.

Until the New York court's decision in *People v. Doe*,[94] the notion of a constitutionally sanctioned familial zone of privacy had not been extended to the situation of parent-child confidential communications.[95] The creation of such a privilege would follow from an acknowledgment by the United States Supreme Court that confidential communications play a critical role in the family. The already recognized and secured values of family privacy and autonomy demand such a privilege. An examination of social-psychological theory[96] will reveal that confidentiality is essential

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92. Consider Mr. Chief Justice Burger's statement:

> The Court's refusal to afford constitutional protection to such commercial matters as bank records, *California Bankers Assn. v. Shultz*, 416 U.S. 21 (1974), or drug prescription records, *Whalen v. Roe*, 429 U.S. 589 (1977), only serves to emphasize the importance of truly private papers or communications, such as a personal diary or family correspondence. These private papers lie at the core of First and Fourth Amendment interests.

Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 529 n.27 (1977) (Burger, C.J., dissenting).

93. *See* notes 106-16 and accompanying text *infra*.

94. 61 App. Div. 2d 426, 403 N.Y.S.2d 375 (1978).

95. *See* text accompanying notes 8-10 *supra*.

96. The influence of scientific and social science literature in the legal decisionmaking process is now widely appreciated. Justice Brandeis held the firm conviction that courts must rely on facts and data. "Knowledge is essential to understanding; and understanding should precede judging. Sometimes, if we would guide by the light of reason, we must let our minds be bold." Burns Baking Co. v. Bryan, 264 U.S. 504, 520 (1924) (Brandeis & Holmes, JJ., dissenting). *See* Adams v. Tanner, 244 U.S. 590, 600 (1917) (Brandeis, J., dissenting); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 21 (1970).

In recent years the majority of the Court has looked to other scholarly professions for guidance before making major policy decisions. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 209 (1972) (Court examined educational and social data in assessing the consequence to the Amish child of compulsory high school education); Williams v. Florida, 399 U.S. 78 (1970) (Court used social scientist's findings in considering choice between six and 12-member juries); Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962) (studies indicated that certain types of drug abuse should be considered a disease); Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954) (Chief Justice Warren indicated that the Court's decision was supported by substantial psychological data). *Contra*, Doyle, *Can Social Science Data Be Used in Judicial Decision Making?*, 6 J.L. & EDUC. 13 (1977). The author expressed doubts as to the real significance of social science in constitutional adjudication. "The decisive factor is the constitution, . . . the wording of the con-

to the family relationship.

CONFIDENTIALITY AND INTERPERSONAL RELATIONS

Confidentiality is an essential aspect of certain socially beneficial relationships. In the absence of confidentiality, interaction might be avoided;[97] but even if parties interact, the fear of disclosure might render the relationship ineffective to achieve its intended purposes. For example, in the psychotherapist-patient relationship[98] the goal is the psychological adjustment of the patient. Therapy is brought about, not solely by any specific treatment, but principally by the quality of the patient-therapist interchange itself.[99] When participating in this exchange, the patient reveals the most intimate aspects of his experiences[100] to the psychotherapist "so that they can explore the meaning and experiential realities of his life."[101] Privacy is imperative here.[102]

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stitution, . . . history, precedent, . . . reason and moral law or natural law." *Id.* at 15.

97. For a discussion of the role of deterrence as an impetus to the creation of evidentiary privileges, see notes 26-27 and accompanying text *supra.*

98. Psychotherapy has been characterized as the "alteration of human behavior through interpersonal relationships." Comment, *The Interest in the Practice of Psychotherapy*, 8 AM. PSYCH. 48, 49 (1953), *quoted with approval in* Fisher, *supra* note 24, at 618. *Accord*, Note, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297, 301 (1973).

99. Fiedler, *Quantitative Studies of the Role of Therapists' Feelings Towards Their Patients*, in PSYCHOTHERAPY—THEORY AND RESEARCH 296-97 (1953). *See generally* C. ROGERS, CLIENT-CENTERED THERAPY (1951); R. SLOVENKO, PSYCHIATRY AND LAW 61 (1973).

100. "The psychiatric patient confides more utterly than anyone else in the world. He exposes to the therapist not only what his words directly express; he lays bare his entire self . . . ." M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952), *cited with approval in* Caesar v. Mountanos, 542 F.2d 1064, 1072 (9th Cir. 1976) (Hufstedler, J., concurring and dissenting), *cert. denied*, 430 U.S. 954 (1977); Taylor v. United States, 222 F.2d 398, 410 (D.C. Cir. 1955). *See generally* C. ROGERS, CLIENT-CENTERED THERAPY (1951).

101. R. SLOVENKO, PSYCHIATRY AND LAW 61 (1973).

102. M. GUTTMACHER & H. WEIHOFEN, PSYCHIATRY AND THE LAW 272 (1952); C. ROGERS, CLIENT-CENTERED THERAPY 343-45, 496 (1951); Fisher, *supra* note 24, at 619-20; Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 744-45 (1957); Note, *The Psychotherapists' Privilege*, 12 WASHBURN L.J. 297, 301-02 (1973); 4 U. KAN. L. REV. 597 (1956).

But consider one commentator's observation that "[t]rust—not absolute confidentiality—is the cornerstone of psychotherapy. Talking about a patient . . . without his knowledge or consent would be a breach of trust." Slovenko, *Psychotherapy and Confidentiality*, 24 CLEV. ST. L. REV. 375, 395 (1975).

Courts as well have acknowledged the therapist's need for confidentiality by recognizing a qualified constitutional right. This right arises out of the right of the patient to privacy. *See* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. de-*

Without privacy, there is a risk that the patient will be inhibited in his revelations and thus not gain the benefits of the relationship.[103]

Similarly, the effectiveness of at least one aspect of the parent-child relationship is coextensive with the degree to which communication is fostered by confidentiality. The parent-child relationship is not a professional, therapeutic relationship. Nor does the promise of confidentiality act as an impetus to the creation of the relationship.[104] However, the fact that the relationship does not arise in anticipation of confidentiality does not in itself preclude the importance of confidentiality. Once the family comes into being, confidentiality becomes crucial.

The growth and effectiveness of any human being is dependent on the quality of his interpersonal relationships.[105] Interpersonal communications constitute a fundamental aspect of most human interaction.[106] According to one eminent family therapist, "communication is to relationships what breathing is to maintaining life."[107]

Some communication, and its concomitant interpersonal relationship, will flourish only within the medium of privacy.[108] This is true even though the overall relationship between the parties may be sustained because of other needs. The parent-child relationship itself exists at least in part because of the child's dependency.[109] Yet, the additional factors that come into play to make

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nied, 430 U.S. 954 (1977); *In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). *See also* note 37 *supra*.

103. Fisher, *supra* note 24, at 618.

104. Compare the parent-child situation to the marital situation, in which confidentiality is not really an inducement. *See* Fawal, *Questioning the Marital Privilege: A Medieval Philosophy in a Modern World*, 7 CUM. L. REV. 307 (1976), in which the author argues that the confidential communications of the marital relationship should be protected only if disclosure would result in damage to that relationship.

105. B. FISHER, PERSPECTIVES ON HUMAN COMMUNICATION ch. 6, at 286-300 (1978); H. SULLIVAN, THE INTERPERSONAL THEORY OF PSYCHIATRY chs. 7, 10, 12 (1953). *See generally* J. CHADWICK-JONES, SOCIAL EXCHANGE THEORY: ITS STRUCTURE AND INFLUENCE IN SOCIAL PSYCHOLOGY (1976); K. DANZIGER, INTERPERSONAL COMMUNICATIONS (1976); E. ERIKSON, IDENTITY, YOUTH AND CRISIS chs. 2, 3 (1968).

106. Ruesch, *The Role of Communication in Therapeutic Transactions*, in THE HUMAN DIALOGUE 260 (1967). *See generally* D. STEWART, THE PSYCHOLOGY OF COMMUNICATION (1968). For a discussion of the dynamics of human communication, see V. SATIR, CONJOINT FAMILY THERAPY chs. 9, 10 (1964); Ruesch, *Synopsis of the Theory of Human Communications*, in THEORY AND PRACTICE OF FAMILY PSYCHIATRY 227 (J. Howell ed. 1971).

107. V. SATIR, MAKING CONTACT 18 (1976).

108. *See* notes 33-37 & 102 *supra*.

109. Dependency has been defined as the extent to which an individual relies on another or others for social reality. Schachter, *Deviation, Rejection and Communication*, in APPROACHES, CONTEXTS, AND PROBLEMS OF SOCIAL PSYCHOLOGY 311, 322 (E. Sampson ed. 1964). *See generally* G. CLORE, K. RENNER, R. ROSE, & J.

up the *total* parent-child interaction must not be taken to detract from the functional aspect of the interpersonal relationship dependent on communication. Just as in similar relationships rooted in communication,[110] the guidance-oriented dimension of the parental role demands the backdrop of confidentiality.[111] The *Doe* court, reaching a similar conclusion, stated:

> It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice.[112]

Absent confidentiality, the familial setting is not ripe for parents to act as their children's confessors and guides. Some findings have suggested that children who are free to confide[113] in their parents show a greater social adjustment,[114] exemplified by better social compliance, greater conformity[115] with social norms, and emotional stability.[116]

The functional effect of the parent-child interaction is consonant with the United States Supreme Court's recognition of the

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WIGGINS, THE PSYCHOLOGY OF PERSONALITY 149 (1971) (discussion of the various kinds of human dependency); Maccoby & Masters, *Attachment and Dependency*, in 2 MANUAL OF CHILD PSYCHOLOGY 73 (P. Mussen ed. 1970).

110. *See* note 102 *supra*. *See also* Robinson, *Testimonial Privilege and the School Guidance Counselor*, 25 SYRACUSE L. REV. 911 (1974) (discussion of the analogous need to protect the confidentiality of the school guidance counselor).

111. Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 618-21 (1970).

112. People v. Doe, 61 App. Div. 2d 429, 403 N.Y.S.2d 375, 378 (1978).

113. "Free to confide" refers not only to an environment conducive to confidence but also to an inclination on the part of the child to confide. It is assumed that if an atmosphere is hostile to confidentiality the child will never develop the disposition to confide. Knowledge of the absence of confidentiality would surely stifle confession. *See* C. ROGERS, CLIENT-CENTERED THERAPY 343-45 (1951). *See generally* authorities cited note 102 *supra*. But the child need not be aware, at the time the statements are made, that the law does not protect his confidentiality. The spectacle of attempting to force disclosure is destructive in its own right. People v. Doe, 61 App. Div. at 433, 403 N.Y.S.2d at 380; Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599, 628-29 (1970).

114. A JERSILD, THE PSYCHOLOGY OF ADOLESCENCE 248 (2d ed. 1967). *See generally* WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION, THE DELINQUENT CHILD 79 (1932).

115. *See generally* Johoda, *Conformity and Independence*, in APPROACHES, CONTEXTS, AND PROBLEMS OF SOCIAL PSYCHOLOGY 96 (E. Sampson ed. 1964).

116. People v. Doe, 61 App. Div. 2d at 433, 403 N.Y.S.2d at 380; A. JERSILD, THE PSYCHOLOGY OF ADOLESCENCE 248 (2d ed. 1967); *see* authorities cited note 11 and accompanying text *supra*.

role of the family in American life.[117] Thus,

> [i]f we accept the proposition that the fostering of a confidential parent-child relationship is necessary to the child's development of a positive system of values, and results in an ultimate good to society as a whole, there can be no doubt what the effect on that relationship would be if the State could compel parents to disclose information given to them in the context of that confidential setting.[118]

If the family is to succeed in its constitutionally acknowledged posture, its right to privacy must be respected. The *Doe* court appropriately extended constitutional protection to the confidential dimension of family life. Preservation of the family necessitates this sanction of confidentiality.

Parameters of the Child-Parent Zone of Privacy

An attempt to posit the entire scope of the proposed child-parent confidential privilege would be futile. However, there are some general principles that a court should consider. "Due process" itself cannot be reduced to a formula.[119] It reflects the balance that "our nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[120] When a "fundamental" interest is implicated, a court should carefully scrutinize the asserted state interest.[121] This process operates within the context of each set of facts. The dimensions of the individual's zone of privacy evolve with the case law. This case-by-case adjudication "accords with the tried and traditional" approach to defining the scope of a constitutional right.[122]

In the instance of the child-parent communication, the state's interest in obtaining testimony cannot be doubted.[123] Usually, however, the interest of the individual and of society in protecting "the parent-child relationship is of such overwhelming significance that the state's interest in fact-finding must give way."[124] The destructiveness of requiring disclosures overshadows the loss of potential evidence in most instances. Yet the privilege is not

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117. *See* notes 58-78 and accompanying text *supra*.
118. People v. Doe, 61 App. Div. 2d at 433, 403 N.Y.S.2d at 380.
119. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
120. *Id.*
121. *See* notes 67-68 and accompanying text *supra*.
122. Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring).
123. People v. Doe, 61 App. Div. 2d at 433-34, 403 N.Y.S.2d at 380.
124. *Compare id., with* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977), *and In re* Lifschutz, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970). These latter cases involved a psychotherapist asserting his patient's rights when the patient had tendered the issues into evidence. These courts' results might have been otherwise had the case involved a patient defendant asserting the confidential privilege.

absolute.[125]

The child-parent privilege might be restricted in the following situations: When the child is the chief prosecution witness, the defendant's sixth amendment right to confrontation might preclude the application of the privilege.[126] The accused must be permitted to impeach a confronting witness by the introduction of prior inconsistent statement to call into question the credibility of the witness' testimony.[127] Similarly, to permit the assertion of a confidential privilege relevant to an issue which the child himself tendered into evidence would be manifestly unfair.[128] Nor should the privilege apply to protect communications made to enable the child to commit a future crime or fraud.[129] This exception would not remove the privilege as to the confession of previous

125. Some authorities argue for absolute constitutional rights not susceptible to dilution by the courts. Branzburg v. Hayes, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting) (balancing tends to erode first amendment rights); Konigsberg v. State Bar, 366 U.S. 36, 60-80 (1961) (Black, J., dissenting); Sterk, *Testimonial Privileges: An Analysis of Horizontal Choice of Law Problems*, 61 MINN. L. REV. 461, 468 (1977); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 982-85 (1977) (balancing erodes these rights); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 479 (1977).

Consider Branzburg v. Hayes, 408 U.S. 665 (1972), in which the majority, according to Justice Stewart, adopted a "crabbed view" of the first amendment: The majority refused to adopt even a qualified newsman's privilege based on the first amendment. *Id.* at 725 (Stewart, J., dissenting). For a more moderate approach to the majority's holding, see *id.* at 709 (Powell, J., concurring) (Powell adopts a case-by-case approach and would limit the decision to its facts). *See also* Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, Brennan, & Marshall, JJ., dissenting); Goodale, Branzburg v. Hayes *and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1975).

126. *See* Davis v. Alaska, 415 U.S. 308 (1974), in which the chief prosecution witness in a larceny case asserted a juvenile privilege of anonymity. The Court held that the defendant's sixth amendment right to confront the witnesses against him overshadowed the local privilege. State v. Hembd, 305 Minn. 120, 232 N.W.2d 872 (1975) (the medical privilege must yield to right to confrontation).

However, the right to confront and to cross-examine a witness is not absolute and must sometimes "bow to accommodate other legitimate interests." Chambers v. Mississippi, 410 U.S. 284, 295 (1973). *See generally* 60 MINN. L. REV. 1086 (1976).

127. *See* note 126 *supra*.

128. Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976), *cert. denied*, 430 U.S. 954 (1977); *In re* Lifschutz, 3 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 3d 829 (1970); FED. R. EVID. 501; CAL. EVID. CODE § 1016 (West 1966 & Supp. 1978); 2 D. LOUISELL & C. MUELLER, *supra* note 23, § 216, at 611.

129. *See generally* FED. R. EVID. 501; CAL. EVID. CODE §§ 956, 981, 997, 1018 (West 1966 & Supp. 1978); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 78, 95, at 162, 199-201 (2d ed. 1972); 2 D. LOUISELL & C. MUELLER, *supra* note 23, §§ 213, 219, at 578-80, 649.

crimes.[130]

The parent-child privilege will find its widest application in proceedings when the child is the defendant or the accused. When the child is on the defensive, it is consistent with the underlying premises of sanctioning the privilege to permit its assertion. The child's parents should stand by his side and should not be forced to betray him in court.

CONCLUSION

Ample evidence supports the premise that confidentiality between parent and child is an essential component of their relationship. The child's healthy development stands in the balance. Seizing upon this, the *Doe* court unanimously prescribed a constitutional right to protect confidential parent-child communications. This constitutional right both arises out of and buttresses the firmly established rights to family privacy and autonomy already enumerated by the United States Supreme Court. The logical consequences of the Court's prior holdings would erect a sanctuary to the private communications of this intimate relationship. Only after these natural ties of fidelity are respected will the directive of the Bill of Rights be discharged.

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130. *See generally* 2 D. LOUISELL & C. MUELLER, *supra* note 23, § 219, at 649 n.67.